Amalgamated Transit Union Division 822 *and* German Trujillo. Case 22–CB–6430

December 23, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 21, 1991, Administrative Law Judge Jesse Kleiman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Steven Kessler, Esq., for the General Counsel.
Richard P. Weitzman, Esq. (Weitzman & Rich, P.C.), of Irvington, New Jersey, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. The charge was filed by German Trujillo on April 17, 1990, and a complaint and first amended complaint were issued on June 1 and 8, 1990, respectively. The complaints allege that Amalgamated Transit Union Division 822 (the Respondent Union), engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act (the Act), by failing to represent German Trujillo, Jorge Fernandez, Jose Dominguez, and Ramon Blasquez for reasons which are unfair, arbitrary, invidious, and a breach of the fiduciary duty owed to the employees whom it represents. The Respondent Union filed its answer on June 18, 1990, denying the material allegations in the complaints and raising the following affirmative defenses: That the above-mentioned employees ''by their own acts, brought about the action of the Employer in discharging them''; that these four employees ''by their own acts, furnished their fellow members of the Union with proper cause to determine, in good faith, not to vote to proceed with their grievances to arbitration; and that should it be determined that the Respondent Union has in fact violated the Act as alleged in the complaints,'' that a full hearing as to the merits of each of the grievances would be required as a precondition to assessing any ''remedial award in favor of the grievant[s] by way of damages.''[1] This case was tried in Newark, New Jersey, on October 15, 1990.

On the entire record and the briefs filed by the General Counsel and the Respondent Union and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The Bergen Avenue Bus Owners Association (the Employer), a corporation with an office and place of business in Bayonne, New Jersey, is engaged in the business of the transportation of passengers. During the preceding 12 months, the Employer has derived gross revenue in excess of $250,000 in the course and conduct of its business operations. The Respondent Union admits, and I find, that Bergen Avenue Bus Owners Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is uncontested, and I find, that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act and that by virtue of Section 9(a) of the Act, the Respondent Union is the exclusive bargaining representative for the purposes of collective bargaining of the Employer's employees in a unit appropriate for the purposes of collective bargaining composed of all bus drivers employed by the Employer excluding office, clerical, supervisory, mechanics, guards, watchmen, dispatcher, owner-drivers (providing they have at least a 10-percent interest in their corporation), and sons or daughters of the owners of record as of the effective date of an agreement between the Employer and the Respondent Union which ran from September 1987 through September 7, 1990. Additionally, the Respondent Union admits, and I find, that Jose Moreno was and is the Respondent Union's president and an agent acting in its behalf within the meaning of Section 2(13) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. Background

The collective-bargaining agreement between the Employer and the Respondent Union (September 8, 1987–September 7, 1990) contained a grievance and arbitration procedure provision which provides for a grievance meeting between the Employer and the grievants ''and/or his Shop Steward'' (Step One), then a hearing before ''the Pooling

[1] In *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988) (*Mack-Wayne II*), the Board held that ''the General Counsel must initially establish that an employee's grievance was not clearly frivolous as a prerequisite to a provisional make-whole remedy. Once the General Counsel meets that burden, the burden of proof shifts to the union to establish that the grievance lacks merit. The Union may elect to litigate that issue in either the unfair labor practice stage or in a compliance proceeding.'' At the hearing the Respondent Union elected to litigate the issue of the merits of the four grievances involved at the compliance stage of these proceedings should it be found that the Respondent Union violated the Act as alleged.

Board of the Association '' (Step Two), and then if the grievance is unresolved it is submitted to the New Jersey Board of Mediation for arbitration (Step Three).

Moreover, the Respondent Union's Constitution and bylaws article II, section 6 provides in pertinent part that:

> The Executive Board shall recommend whether or not an appeal through arbitration shall be taken in cases where a member of this Division has been discharged by management. In cases of arbitration affecting our members, the matter must be referred to a Referendum Vote of the hourly rated members from the company involved, with the provision that should the members agree to arbitration the costs will be assessed equally against each of the hourly rated members of the Division from the company involved in the arbitration case. All approved arbitration cases must be carried through to the completion of the case, if the member so desires.[2]

2. The grievances

German Trujillo, Jorge Fernandez, Jose Dominguez, and Ramon Blasquez (referred to collectively as the grievants and individually by name), were employed as full-time bus drivers for the Employer with their own ''runs.''[3] The grievants were discharged by the Employer on or about June 28, 1989, for allegedly stealing company revenues. The Respondent Union filed timely grievances on behalf of each grievant and processed these grievances through Steps 1 and 2 of the grievance procedure. At the grievance meetings the Respondent Union was shown ''undercover reports,'' made by ''undercover agents'' of an outside investigative agency hired by the Employer to observe its operations, which accused the grievants of ''fare irregularities or fare clipping, explained as removing company funds from the company fare box without authorization.'' Additionally, at the grievance meetings, the Employer asserted that Jose Dominguez had confessed to having done this.

In accordance with the requirements of the Respondent Union's constitution and bylaws, Moreno, who had represented the grievants at the grievance meetings, presented the matter to the Respondent Union's executive board[4] and recommended that these grievances should proceed to arbitration because he felt that notwithstanding the Employer's evidence, which he had some doubts about, the grievants had a ''50–50'' chance to be successful at arbitration. The Respondent Union's executive board agreed and voted to recommend to the membership that these grievances be taken to arbitration.

3. The union meeting of March 7, 1990

By letter dated February 28, 1990, the Respondent Union notified the grievants that an ''arbitration vote concerning your case'' would be held at the Welcome Inn in Bayonne, New Jersey, on March 7, 1990, and that it was important for each grievant to attend the meeting in order to explain his case to the membership.

Present at the March 7, 1990 union meeting were Moreno, Robert Wood, the Respondent Union's secretary-treasurer, three of the grievants (Trujillo, Fernandez, and Dominguez)[5] and 18 other union members including Rudy Morgan, the shop delegate. The Respondent Union's witnesses testified that Moreno explained the arbitration process to the membership and asked if there were any questions regarding this procedure. One of the members asked about the cost of arbitrating the grievances and Moreno explained that the membership would be assessed for the costs of each individual arbitration case. Moreno told them that after the costs of the arbitration was determined, he would discuss with the membership the method and amount of the assessment and the membership would decide how payment would be made, whether in a lump sum or by monthly deductions so as to have the ''least amount of impact . . . on the membership financially.''

Next, Moreno explained each of the grievant's cases, that they had been accused of stealing company funds and discharged based on outside undercover agents' investigative reports of such alleged thefts. Moreno told the membership that it was the Respondent Union's executive board recommendation as well as his own that these grievances should be sent to arbitration, since he felt that the grievants had a ''50–50'' chance of winning their arbitration cases. Moreno also advised the membership that they should consider each of the grievant's cases on an individual basis and without malice. Moreno was asked if one of the grievants had confessed to having stolen company receipts but Moreno questioned the reliability of any purported confession since no union representative had been present when it was allegedly made and none of the grievants had acknowledged any guilt to either Moreno or shop delegate Morgan.

Additionally, some of the union members[6] asked Moreno what the effect would be on the job rights of other employees should the grievants win their arbitration cases. Moreno responded that the grievants would be reinstated to their full-time day positions with scheduled runs while those drivers who had taken their jobs after the discharges would be ''bumped'' back to full-time positions either on the night shift or guaranteed 40 hours weekly but with no set runs. Any part-time busdriver who had been moved up to a full-time position related to the grievants' discharges would be returned to the part-time pool. Moreno also told the membership that no part-timer would be terminated since there was sufficient work present to retain them all and at the worst there might occur a reduction in the part-time hours available.

The grievants present at this meeting were then given the opportunity to speak to the membership on their own behalf

[2] Sec. 21.15 of the constitution and general laws of the Amalgamated Transit Union (the International Union), makes provision for such an assessment by the local unions.

[3] The hiring dates of the respective grievants were: July 9, 1978, February 17, 1982, July 10, 1969, and March 23, 1981.

[4] The Respondent Union's executive board is composed of the Union's president, Moreno, the Union's secretary and the union delegate.

[5] Grievant Ramon Blasquez did not attend this meeting.

[6] Lee Roy Borders and Eric McCovery, both part-time busdrivers at that time. Borders testified that this was not a factor affecting his vote on the arbitration issue. McCovery testified that since there was plenty of work for the part-time busdrivers during that period, he was not concerned about losing his job in connection with the arbitration vote nor about the assessment for the arbitration costs. Although unsure of this, Moreno stated that possibly Clifford Lewis, a full-timer, had also asked this question.

which Trujullo and Fernandez did.[7] They were asked to explain the charges made against them, and both Trujillo and Fernandez professed their innocence denying any wrongdoing on their part, and asserted that the Employer was out to get them for some time. Trujillo told the membership that the reason for the Employer's enmity against him was because of his participation in a prior strike action. Trujillo then asked the members for their support and declared that the grievants were willing to pay for the costs of the arbitrations out of their own pockets. Moreno explained to Trujillo that under the Respondent Union's constitution and bylaws the membership was required to vote on whether or not to take a grievance to arbitration and to pay for the costs of any arbitration so voted.

The membership then voted by secret ballot for each of the 4 grievances individually with the resulting vote tally being: Trujillo—7 yes, 12 no, 1 void; Fernandez—7 yes, 13 no; Dominguez—8 yes, 11 no; Blasquez—6 yes, 13 no. These grievances were not taken to arbitration.

Moreno also testified that after the vote had been taken several of the union members told him, ''Jose, you don't know what's going on. . . . They were doing it.'' One of the members also made reference to the finding of a ''plumbers tool'' on one of the grievant's buses which could be used to extract moneys from the bus fare box. Moreno, however, told them that the vote had already been taken.

While the testimony of the General Counsel's witnesses, Trujillo and Fernandez, was similar to that given by the Respondent Union's witnesses as set forth above with respect to what generally occurred at this meeting, it did differ therefrom in several significant aspects. Both Trujillo and Fernandez denied that Moreno had explained the reasons for their discharge or that any questions were asked by the membership regarding the merits of the grievances or that any discussion ensued about this, contrary to the testimony of the Respondent Union's witnesses.[8] Moreover, both these witnesses stated that Moreno had told the members that they would be assessed the sum of $1 per member for each case that went to arbitration (a total of $4 should the four grievances be voted to arbitration). They also testified that Moreno had advised the membership that should these arbitration cases be won by the grievants then they would be returned to their former positions displacing any employees who had been placed in their jobs and who would then return to their prior positions with the result that at least one part-time busdriver would lose his job based on seniority status. Trujillo also testified that Moreno never said that the grievants had a ''50–50'' chance to win their arbitration cases or that the Respondent Union's executive board had suggested that their grievances be taken to arbitration, again in opposition to the testimony of the Respondent Union's witnesses.

4. Additional evidence

The following is a list of the date of hire, the status of the driver, full-time (FT) or part-time (PT), and the date of promotion to full-time where applicable of the union members who attended the March 7, 1990 meeting and the four grievants:[9]

Jose Dominguez	7/10/69
German Trujillo	7/9/78
Uvaldo Chavez	12/6/78
Julio Martinez	3/8/80
Ramon Blasquez	3/23/81
Jose Ramon	8/16/81
Jorge Fernandez	2/17/82
Raul Hernandez	3/30/83
Rudy Morgan	3/10/84
Eugene Reo	9/7/84
David Ravenell	8/20/85
Brenda Davis	7/20/89(PT)
John Scott	12/28/86
James Smith	1/9/88(PT)
Frank Kenny	4/30/88(PT)
Harvey Waiters	8/4/88; (FT) 8/14/89
Eddie Wheeler	3/3/89(PT)
Clifford Lewis	3/24/89; (FT) 8/14/89
James Mann	5/18/89(PT); (FT) 10/1/90
Eric McCovery	6/9/89(PT); (FT) 10/1/901
Lee Roy Borders	6/9/89(PT); (FT) 10/1/90
Jeffrey Chambers	7/9/89; (FT) 10/15/89

Additionally, the Respondent Union produced evidence of nine cases covering the period 1986–1989, wherein the membership had voted to take employee disciplinary grievances to arbitration, five of which involved employee discharges, the other four employee suspensions. These cases were submitted to membership vote pursuant to the same provisions of the Respondent Union's constitution and bylaws as in the instant case. Moreover, evidence was submitted showing that under this same procedure, the Respondent Union's membership voted affirmatively to process the following grievances to arbitration regarding grievants Trujillo, Valesquez, and Blasquez:

October 1986—Trujillo and Valesquez—suspension grievances
February-June 1987—Trujillo—discharge grievance
October 1988—Blasquez—suspension grievance

[7] Trujillo and Fernandez both speak Spanish, are not fluent in English, and have a limited understanding of the English language. They testified through the use of an interpreter. It appears from the record evidence that the March 7, 1990 meeting was conducted mostly in English except where questions were asked in Spanish and then Moreno responded to these questions in both English and Spanish.

[8] Trujillo acknowledged that he had arrived at the meeting after it had commenced and that perhaps such a discussion may have preceded his arrival. However, the evidence in this case tends to show that if the reason for the grievant's discharges, etc., were discussed at all, this occurred at a time when Trujillo would actually have been present at the meeting. While the minutes of the March 7, 1990 meeting state in substance that the ''floor'' was turned over to Trujillo ''so he could answer any questions the membership may have or to make any statement he may wish,'' the minutes are silent as to whether any questions were asked and if so what such questions encompassed. Robert Wood, who took and prepared the minutes, testified that he had failed to record the questions and answers made at this meeting since he records the minutes in longhand, but he acknowledged that the membership did in fact ask Trujillo and Fernandez about the circumstances of their grievances as did the Respondent Union's other witnesses.

[9] All busdrivers listed were full time unless designated otherwise.

B. *Analysis and Conclusions*

The Duty of Fair Representation

1. The amended complaint alleges in substance that the Respondent Union violated Section 8(b)(1)(A) of the Act by taking the grievances of German Trujillo, Jorge Fernandez, Jose Dominguez, and Ramon Blasquez to a vote of the union membership which had pecuniary and job interests in voting not to proceed to arbitration, thus it failed to represent these employees for reasons which are unfair, arbitrary, invidious, and a breach of the fiduciary duty owed the employees who it represents. The Respondent Union denies this allegation.

In *Vaca v. Sipes*, 396 U.S. 171 (1967), the Supreme Court of the United States stated:

> It is now well established that, as the exclusive bargaining representative of the employees . . . the Union [has] a statutory duty fairly to represent all of those employees, ''and that this duty'' includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct . . . a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.[10]

In interpreting the appropriate standard fashioned by the Supreme Court in the *Vaca v. Sipes* case by which to measure union conduct, the United States Court of Appeals, Fourth Circuit, in *Griffin v. Auto Workers*, 469 F.2d 181 (4th Cir. 1972), stated:

> A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

A labor organization which fails to live up to this obligation unjustifiably restrains employees in the exercise of their Section 7 rights and thereby violates Section 8(b)(1)(A) of the Act.[11] The duty of fair representation has been held to extend to the investigation, processing, and representation of grievances.[12]

However, at the same time the courts and the Board have recognized that unions must necessarily be allowed a ''wide range of reasonableness'' in serving their constituencies, but in the exercise of that discretion, a union must act in ''good faith, with honesty of purpose, and free from reliance on impermissible considerations.''[13] Accordingly, a union does not violate the duty of fair representation where it refuses to process a grievance pursuant to a reasonable interpretation of the collective-bargaining agreement[14] or a good-faith evaluation as to the merits of the grievance.[15] An employee has no absolute right to have a grievance processed through to any particular stage of the grievance procedure or to have a grievance taken to arbitration.[16] A union may screen grievances and press only those it concludes will justify the expense and time involved in terms of benefiting the membership at large.[17] But, as the Supreme Court held in *Vaca v. Sipes*, a union will breach its duty of fair representation when it has ''arbitrarily ignored a meritorious grievance or processed it in a perfunctory fashion.''[18] Moreover, a union is not liable under the duty of fair representation for mere negligence, poor judgment, ineptitude, forgetfulness, or inadvertence.[19]

The Board as well as a majority of the courts have held that a union can violate its duty of fair representation absent any evidence of bad faith if it is shown that the union acted in a perfunctory or arbitrary manner.[20] As the United States Court of Appeals, Fourth Circuit, explained in *Griffin v. Auto Workers*, supra at 183:

> Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.

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[10] Also see *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *NLRB v. American Postal Workers Missouri Local*, 618 F.2d 1249 (8th Cir. 1980); *Miranda Fuel Co.*, 140 NLRB 181 (1962).

[11] *Vaca v. Sipes*, supra; *American Postal Workers Missouri Local*, 240 NLRB 1198 (1979), enfd. in pertinent part 618 F.2d 1249 (8th Cir. 1980); *Laborers Local 300 (Memorial Park)*, 235 NLRB 334 (1978).

[12] *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

[13] *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Hines v. Anchor Motor Freight*, supra; *Ryan v. New York Newspaper Printing Pressmens Union 2*, 590 F.2d 451 (2d Cir. 1970); *P.P.G. Industries*, 229 NLRB 713 (1977); *Ohio Valley Carpenters District Council*, 226 NLRB 1032 (1976).

[14] *Steelworkers Local 7748 (Eaton Corp.)*, 246 NLRB 12 (1979); *P.P.G. Industries*, supra; *Ohio Valley Carpenters District Council*, supra.

[15] *Communications Workers Local 3217*, 243 NLRB 85 (1979).

[16] *Vaca v. Sipes*, supra; *Griffin v. Auto Workers*, supra.

[17] *Griffin v. Auto Workers*, supra; *Encina v. Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971).

[18] Also see *Hines v. Anchor Motor Freight*, supra; *Steelworkers Local 15167 (Memphis Folding Stairs)*, 258 NLRB 484 (1981), enf. denied 692 F.2d 1052 (7th Cir. 1982). Compare *Service Employees Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692 (1977), in which the Board found that the union's grievance investigation was perfunctory and arbitrary, and *San Francisco Web Pressmen & Platemakers Union 4*, 249 NLRB 88 (1980), wherein the Board held that the union's investigation was reasonable.

[19] *Plumbers Local 195 (Stone & Webster Engineering)*, 240 NLRB 504 (1979); *Massachusetts Laborers' District Council (Manganaro Masonry)*, 230 NLRB 640 (1977); *King Soopers, Inc.*, 222 NLRB 1011 (1976); *San Francisco Web Pressmen & Platemakers Union 4*, supra; *Teamsters Local 692 (Great Western)*, 209 NLRB 446 (1974). In *Service Employees Local 579 (Beverly Manor Convalescent Center)*, supra, the Board found a violation of the union's duty of fair representation where the union failed to conduct any investigation of the asserted reason for the grievants' discharge.

[20] *Furniture Workers Local 76B (Office Furniture)*, 290 NLRB 51 (1988), and cases cited in fn. 62 therein.

Moreover, in *Miller v. Gateway Transportation Co*., 616 F.2d 272 (7th Cir. 1980), the United States Court of Appeals, Seventh Circuit, citing *Griffin v. Auto Workers*, supra, stated:

> We note also that the duty of fair representation is of a special importance when a grievance for wrongful discharge is involved. As the Fourth Circuit said, ''A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge—the industrial equivalent of capital punishment.'' *Griffin v. Auto Workers*, 469 F.2d 191 (4th Cir. 1970).

In addition and of significant importance, the Board has noted that the duty of fair representation encompasses obligations that cannot be avoided by a union delegating the authority to make decisions and, when such decisions are delegated to its membership, the union is not immune from the consequences thereof, since, by having selected the method for determination, it is underwriting its inherent fairness.[21] Moreover, the duty of fair representation encompasses the obligation to provide substantive and procedural due process in taking action or refraining therefrom, without reference to whether the union's conduct effects a discrimination as such.[22]

Whether a union breached its duty of fair representation depends on the facts of each case.[23] There is no evidence in this case of hostility or animus on the part of the Respondent Union towards any of the four grievants nor facts indicating possible bad faith and, therefore, the issue to be resolved is whether the Respondent Union acted in an arbitrary manner regarding the grievances of Trujillo, Fernandez, Dominguez, and Blasquez. In applying the above principles to the facts in this case, I find and conclude that the Responent Union did not breach its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

First, it should be noted that the Board has not found it improper for a union to delegate to its membership the authority to decide whether or not a grievance should be taken to arbitration so long as the statutory standard of fairness is met within the context of such delegation.[24] Nor has the Board declared it unlawful for a union to require payment by its membership of the costs of processing a grievance through arbitration unless such charges or assessments are discriminatorily applied or in some other manner constitutes arbitrary or bad-faith conduct.[25] Additionally, it has been held that where a union decides in good faith and on the basis of objective, rational criteria that a grievance lacks sufficient merit to justify the expense of arbitration, such decision does not violate the Act,[26] and I believe that this would also be true where the union delegates such decisional authority to its membership.

Second, after carefully considering the record evidence, and basing my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole, I tend to credit the account of what occurred, as given by the Respondent Union's witnesses.[27] Their testimony was given in a forthright manner, was generally corroborative and consistent with each others and, most importantly, apparently consistent with the other evidence in the record and therefore most believable. For significant example, the Respondent Union's president, Jose Moreno, testified that at the membership meeting on March 7, 1990, at which the four grievances were considered by the membership for arbitration, he explained what each grievance case was about, that the grievants had been discharged ''for theft of company funds or company receipts'' based on the surveillance reports of outside undercover agents. The General Counsel's witnesses, Trujillo and Fernandez, denied that the reasons for their discharges were mentioned or discussed. However, Moreno's testimony in this regard was corroborated by several of the Respondent Union's other witnesses who attended this meeting,[28] by the minutes taken at the meeting by the Union's secretary-treasurer, Robert Wood, and, most importantly, by the ''Stipulation'' of facts in evidence which states:

> 10. Moreno explained the case to the membership and stated it was the Executive Board's as well as his recommendation to proceed to arbitration. He stated that the membership should consider each case individually.

Moreover, both Trujillo and Fernandez denied that Moreno had said that the Union's executive board had recommended that their grievances be taken to arbitration which is clearly contradicted by the parties ''Stipulation.''

With the above in mind, where the courts and the Board have found that a union breached its duty of fair representation in those cases involving the union's delegation of its authority to its membership in grievance processing or other aspects of contract administration, and where there has been no finding of union hostility, discrimination, bad faith, or dishonesty, there has been involved a significant or total presence of self-interest or conflict-of-interest motivation on the part of the membership or the party to whom the Union delegated its decisional authority, and without there being any evidence present of an accompanying consideration of the merits of the grievance.[29]

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[21] *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976).

[22] *Operating Engineers Local 324*, 226 NLRB 587 (1976).

[23] *Griffin v. Auto Workers*, supra at 182; *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963).

[24] *Teamsters Local 315 (Rhodes & Jamieson)*, supra at 619; *NLRB v. Teamsters Local 315*, 545 F.2d 1173 (9th Cir. 1976). Also see *Oil Workers Local 5–114 (Colgate Palmolive Co.)*, 295 NLRB 742 (1989). In these cases, had the Board wanted to accomplish such a result it could have done this directly, given the opportunity that it had to do so. In focusing on the discriminatory nature of the results of such a delegation to the union membership factually these decisions give rise to the corollary that such a delegation would be lawful if no discriminatory action flows therefrom.

[25] *Machinists Local 697 (H.O. Canfield Rubber Co.)*, 223 NLRB 832 (1976); *Hughes Tool Co*., 104 NLRB 318 (1953).

[26] *Vaca v. Sipes*, supra; *Griffin v. Auto Workers*, supra; *Encina v. Tony Lama Boot Co*., 448 F.2d 1264 (5th Cir. 1971); *Curth v. Faraday, Inc*., 401 F. Supp. 678 (1975).

[27] *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 320 (1976).

[28] See the testimony of Woods, Leroy Borders, Eric McCovery, and Rudy Morgan.

[29] For example: In *Griffin v. Auto Workers*, supra, the union placed a grievance matter in the hands of a hostile person, the grievants' antagonist; in *Auto Workers Local 600 (Ford Motor)*, 225 NLRB 1299 (1976), the union permitted its agent to handle a grievance and

In the instant case, the credited evidence shows that Moreno explained the grievance and arbitration process and the cicumstances of each of the four grievances to the membership at the March 7, 1990 union meeting. Questions were asked by individual members about the costs of arbitrating these grievances, and about the effect of the success of these grievances on the job rights of other employees. Moreno's responses to these questions indicated that the membership would be assessed the costs of any grievance sent to arbitration and that the membership would determine the method of payment so as to make such payments as financially painless as possible; and that should the grievants win their cases at arbitration they would be reinstated to their former positions and those employees who now held these jobs would be returned to their prior jobs, however, with no employees being laid off because of the sufficiency of the work load present. Moreover, a member asked about a confession purportedly given by one of the grievants but Moreno discounted the impact of any such alleged confession advising the membership that both he and the Respondent Union's executive board were recommending that these grievances be sent to arbitration, and that he felt that there was a ''50–50'' chance of winning the arbitrations.

Additionally, the grievants present at this meeting were given the oppotunity to present their cases to the membership and both Trujillo and Fernandez did so. They were asked about the nature of their grievances and Trujillo requested the membership's support in voting affirmatively to take these grievances to arbitration and offered that the grievants' would themselves pay for the costs of the arbitrations. In fact, according to Fernandez' testimony, Trujillo said that ''[W]e didn't need their money and that we would pay for the attorney; that what we needed was their help, their signature from the union.''[30]

The General Counsel argues that:

> Respondent submitted the issue of whether the Grievant's grievances should be taken to arbitration to a vote of the membership despite the fact that the members had a strong pecuniary interest in the decision. . . . Assessing the membership the costs of arbitration directly is especially burdensome where, as in this case, there were several grievances which would have to go to arbitration. . . . The membership voted not to proceed to arbitration even though Moreno recommended that they vote to arbitrate these matters.
>
> The above circumstances made it impossible for the Grievants to have an impartial membership vote on whether the grievances should be processed to arbitration. Failing to provide an impartial, fair and reasonable process to decide if the Grievant's cases would go to arbitration violated the Union's duty of fair representation.

I do not agree.

While the General Counsel's arguments are not without some persuasion and under different circumstances might be decisive,[31] under the facts present in this case, I do not find that to be so. Of significance is the fact that there is evidence in the record that the membership apparently considered the merits of these grievances, at least in good part, in determining whether or not to process the grievances to arbitration. At the March 7, 1990 meeting the question of an alleged confession by one of the grievants was raised and discussed as well as the reasons for the employees' discharges. Additionally, while this occurred after the vote was taken and the meeting concluded, union members stated their belief that the grievants had actually engaged in the alleged illegal conduct for which they were discharged. It should also be noted that prior to the vote, the membership was made aware that an independent outside investigative agency hired by the Employer had allegedly observed the grievants engaging in such conduct. Moreover, Fernandez testified that ''probably everyone must have known'' about the reasons for the discharges among the membership at the meeting.

As indicated hereinbefore, a union may screen grievances and press only those that it concludes will justify the expense and time involved in terms of benefiting the membership at large.[32] It is therefore imperative that when the union delegates such authority to its membership that a decision against arbitration be founded on objective and rational criteria, especially where the membership has a pecuniary interest as a factor therein. But it suffices if such a decision is made in good faith and on the basis of objective, rational criteria that the grievance lacks merit to justify the expense of arbitration. While somewhat of a close question, because four grievances were presented at the membership meeting, from all the above I conclude that such was what occurred in the instant case.[33]

The General Counsel also argues in his brief that:

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reject it notwithstanding the agent's own status as an interested party with a conflicting position and his decision culminating in his own benefit; and in *Teamsters Local 315 (Rhodes & Jamieson)*, supra, the union members voted on an issue of bumping rights but after a layoff had been announced, with each member having knowledge of the layoff status of his own job and with the voting limited to only those who would be adversely affected by a vote to permit bumping.

[30] It is not unusual that, based on the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof may be given less weight or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979).

[31] See *Auto Workers Local 600 (Ford Motor)*, supra, in which the delegated person handling the grievance on behalf of the union, had in effect a pecuniary interest in rejecting the grievance. It appeared therein that the agent's sole reason for rejecting the grievance was his own individual monetary benefit.

[32] *Griffin v. Auto Workers*, supra; *Encina v. Tony Lama Boot Co.*, supra.

[33] The General Counsel states in his brief:

> It was fear that this monetary interest would cause the membership to vote not to proceed to arbitration that caused Trujillo to take the floor and implore the membership for their support, while emphasizing that the Grievants were willing to pay for their own attorneys, even though that would not have been possible.

However, Trujillo's offer that the grievants would pay for the arbitration costs could just as well have been prompted by the membership's reference to an alleged confession by one of the grievants, Moreno's mention of outside investigators reports of their alleged misconduct and membership questions as to the circumstances of their grievances with perhaps the realization that the membership would not believe their protestations of innocence and deny arbitration on the merits, so that there would be no resulting out-of-pocket costs to the membership if the grievances were sent to arbitration.

> The membership also voted not to proceed to arbitration because their job status and seniority would have been adversely affected if the Grievants had won their arbitration and the arbitrator had ordered reinstatement with full seniority rights . . . the entire membership would have been adversely effected. . . . The pertinent facts present here are analogous to the facts in *Teamsters Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616 (1975), [hereinafter referred to as *Rhodes & Jamieson*].

Again I do not agree.

While I concur with the General Counsel's assessment that should the grievants win their arbitration cases some employees would be required to be returned to their prior positions, this would normally be true in any case involving a discharge grievance successfully pursued through arbitration, although somewhat moreso in the instant case because of the number of grievances involved at the same time. However, as indicated previously, the Board has not declared it unlawful for a union to delegate its authority to the membership to decide the issue of whether or not to process a grievance to arbitration, notwithstanding that members' seniority or job rights could be affected by the outcome of the arbitration, unless such rights were the main or sole factor influencing the members decision.

In *Rhodes & Jamieson*, the applicable collective-bargaining agreement provided:

> Where jobs or equipment are eliminated senior employees shall be reassigned by the employer to another classification with full seniority rights subject to employee qualifications. Local 315 reserves the right to apply this principle by individual employer.

The employer therein announced its intention to eliminate the delivery service jobs of two drivers, one of whom was Ted Holman. The union had not yet determined whether to apply the bumping rights principle to this employer. The union conducted an election among its members employed at the particular plant involved. The ballot used stated:

> Do you want the warehousemen, yard men, flat rack and dump drivers to be re-assigned, with their full seniority, as ready-mix drivers.

Those members voting cast 8 ''yes'' votes and 20 ''no'' votes. Holman was then terminated.

Although the employer desired to reassign Holman to another job, the union decided not to permit him to be placed in the other job because of the election results. Holman appealed the decision to the union's executive board which upheld his appeal ''because a vote was taken after the fact that an operation was being eliminated and that a fair vote could not be taken at this time.'' The union's executive board's decision was reversed on appeal to the ''Teamsters Joint Council No. 7.'' The Board majority held that the union had failed to represent Holman in a fair and impartial manner in violation of Section 8(b)(1)(A) of the Act.

In *Rhodes & Jamieson*, after referring to Judge Sobeloff's ''significant statement describing the duty of unions not to be arbitrary . . . writing for the Fourth Circuit'' in *Griffin v. Auto Workers*, supra, that ''A union may refuse to process a grievance . . . for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority,'' the Board stated:

> What Judge Sobeloff said about handling grievances is equally applicable to the administration of collective-bargaining agreements outside the grievance procedures. In the instant case like *Miranda Fuel*, the Union acted affirmatively to deprive an employee of a claimed contractual right which was recognized by the Employer. In such cases, although we may apply the same standard of review, we do not have the problem of determining whether the union acted within its wide latitude of discretion in determining whether to commit its limited resources to the pursuit of a grievance.

However, that ''problem'' is exactly the issue in the case at bar.

The Board continued in *Rhodes & Jamieson*:

> But what was the basis for the position the Union took initially? As far as the record shows, only dump truck drivers were included in the announced layoff. Yet the ballot, which was given to the voters after the announcement of the layoff, asked the voters whether they wanted ''the warehousemen, yard men, flat rock and dump drivers to be re-assigned, with their full seniority, as ready-mix drivers.'' The record does not tell us on what information this characterization of the potential impact of the bumping right was based. It appears to be grossly inaccurate as a description of the announced layoff and substantially incomplete as a description of the contractual bumping provision, omitting as it does the mutuality of the right. We do not know what information the voters had available to them with which to evaluate the accuracy of that characterization of the bumping issue. We do not know what opportunity was given to any of the interested employees to make their cases before the decisionmakers. What is striking, however, is that the vote was taken after the layoff was announced, and whether or not the voters knew all the details of the layoff each presumably knew whether his own job was scheduled for elimination. Those not scheduled for layoff would naturally think twice before voting for bumping rights just then. And most importantly, the voting on this issue was limited to those, and only those, who would be adversely affected by a vote to permit the bumping. That is, the election itself was designed so that it could express, not fairness, but only the conflict of interest of each member of the electorate.[34]

[34] The United States Court of Appeals, Ninth Circuit, in enforcing the Board's order in *NLRB v. Teamsters Local 315 (Rhodes & Jamieson)*, 545 F.2d 1173 (9th Cir. 1976), stated:

> We do not intimate that it would be improper for a union to use an election process to make a decision under other circumstances. However, we agree with the Board that to base its decision as to whether the bumping principle should in general be applied to this Employer upon an expression from the employees so limited in scope and focus constituted arbitrary Union action without rational basis prejudicial to Holman, and a failure fairly to represent his interests.

In contrast to *Rhodes & Jamieson*, in the instant case the grievants were given the opportunity to present their cases before the decisionmakers, the effect of any bumping or seniority rights of the members in connection with the successful arbitration of these grievances was explained with the prediction that there would be no layoffs resulting therefrom, and most importantly, there is evidence in the record that the numbers considered the merits of the grievances in voting as they did as part of the decisionmaking process. Additionally, much of what is discussed in support of my conclusions concerning the other issues presented in this case is also applicable hereto.

Whether a union breached its duty of fair representation depends on the facts of each case.[35] However, it is also true that the burden of proving allegations in the amended complaint rests on the General Counsel.[36] I am not unmindful that taken together, a pecuniary interest coupled with a job interest in the outcome of a vote regarding whether to process a grievance to arbitration might exert more influence on the membership voting than if only one of such interest were involved. This is actually what makes this a close case. But these interests are usually always present in some degree in these types of cases, and in the instant case there is sufficient evidence in the record to conclude that the membership had given consideration to the merits of the grievances and decided that they lacked sufficient merit to justify the expense of arbitration. The courts and the Board have held that a decision made in good faith and on the basis of objective, rational criteria, that a grievance lacks sufficient merit to justify the expense of arbitration, such a decision does not violate the Act.[37]

From all the above and from the circumstances present in this case, I find and conclude that the General Counsel has not sustained the burden of proving the allegations in the amended complaint nor established that the Respondent Union violated Section 8(b)(1)(A) of the Act by breaching its duty of fair representation.

2. The amended complaint also alleges that the procedure required by the Respondent Union's constitution and bylaws, namely, that the costs of arbitration be bourne directly by the membership, violates its ''duty to represent all Unit employees in a fair and impartial manner,'' and thereby the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act. The Respondent Union denies this allegation.

The General Counsel contends that:

> The procedure of assessing the costs of arbitration directly on the membership, in cases where the membership has voted to proceed to arbitration creates an inherent conflict between the membership's desire to adjust inequities and their own economic self interest. . . . The directness of the economic interest will necessarily increase the concern the membership has over costs, which creates the possibility that the membership will not vote for what it feels is right but will vote its own self interest. This conflict becomes even more of a factor where, as here, the bargaining unit is not large. Further, the cost of arbitration remains high. There is no reason why this conflict has to exist. The alternative, for the costs to come out of a general fund, offers a legal means of financing the costs of arbitration. The Respondent, by contractually requiring that the costs of arbitration be assessed directly against its hourly rated employees, has made the procedure of determining whether cases should be taken to arbitration inherently unfair and unreasonable, in violation of the Act.

The General Counsel seeks a ruling, in effect, which would make a union's requirement that its members be assessed the costs of handling grievances through arbitration a per se violation of Section 8(b)(1)(A) of the Act. I do not believe that either the courts or the Board would prescribe to such a ruling.

It should be remembered that both the courts and the Board have recognized that unions must be allowed a ''wide range of reasonableness'' in serving their constituencies, including grievance handling, although in the exercise of that discretion a union must act in ''good faith, with honesty of purpose, and free from reliance on impermissable consideration.''[38] Moreover, it has been held that an employee has no absolute right to have a grievance taken to arbitration.[39] As indicated hereinbefore, the Board in *Machinists Local 697 (H.O. Canfield Rubber Co.)*, supra, considered the issue of the imposition of costs for the processing of grievances to arbitration and while that case involved costs assessed only against unit employees who were not members of the union, which the Board found to be discriminatory and violative of the Act, the Board did not declare that all direct assessments of members would be inherently unlawful.[40] As Chairman Murphy stated in her opinion ''concurring in part and dissenting in part'' in the *Machinists* case:

> Under these principles, a bargaining representative's requiring payment of a reasonable fee by all employees for processing a grievance, imposed upon members and nonmembers alike, cannot be discriminatory treatment of either group, and such a fee to be paid by nonmembers on the same basis as members cannot be unlawful. The only obligation imposed on a labor organization by the duty of fair representation is that it accord equal nondiscriminatory treatment to all those whom it represents without regard to membership.

As to the General Counsel's argument that such a direct assessment of the membership makes the procedure of having the membership determine whether or not to take a grievance to arbitration inherently unfair and unreasonable because of economic self-interest, one need only look to the evidence of prior grievances being voted to arbitration by the membership, including one involving grievant German Trujillo wherein a prior discharge grievance was voted to arbitration resulting in a rescision of the discharge, with a suspension imposed instead.

From the above, I find and conclude that the provision in the Respondent Union's constitution and bylaws requiring

[35] See fn. 23.

[36] *Clothing & Textile Workers Local 148T (Leshner Corp.)*, 259 NLRB 120 fn. 6 (1982).

[37] See fn. 26.

[38] See fn. 13.

[39] See fn. 16.

[40] Also see *Hughes Tool Co.*, supra.

the assessment of arbitration costs directly to its membership does not violate its duty of fair representation in contravention of Section 8(b)(1)(A) of the Act.

Based on all the foregoing, I find and conclude that the General Counsel did not show that the Respondent Union failed in its duty to fairly represent the four grievants in violation of Section 8(b)(1)(A) of the Act and therefore, I recommend that the amended complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent Union, Amalgamated Transit Union Division 822, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Bergen Avenue Bus Owners Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent Union has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The amended complaint is dismissed in its entirety.

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[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.